

**United States Court of Appeals
for the District of Columbia Circuit**

Nos. 15-1112 & 15-1209

NATIONAL LABOR RELATIONS BOARD,
PETITIONER/CROSS-RESPONDENT

v.

CNN AMERICA, INC., RESPONDENT/CROSS-PETITIONER

**RESPONSE OF CNN AMERICA, INC., TO REVISED PROPOSED
JUDGMENT OF THE NATIONAL LABOR RELATIONS BOARD**

Pursuant to Federal Rule of Appellate Procedure 19, respondent/cross-petitioner CNN America, Inc., respectfully responds to the revised proposed judgment submitted by the National Labor Relations Board. CNN recognizes that the Board presented this proposed judgment at the request of the Court, and does not seek to reargue matters previously submitted to the Court. For the reasons that follow, however, CNN requests that the Court enter four clarifying modifications to conform the order and the appendix to the Court's opinion. *See* Fed. R. App. P. 19.

1. The Court's opinion remanded numerous issues to the Board. *See* slip op. 13, 36, 37-38, 39. Yet the Board's revised proposed judgment

does not mention the Court's remand. CNN therefore respectfully requests that the proposed judgment be modified to explicitly refer to remand through inclusion of the following language to be inserted at the end of the proposed judgment:

“FURTHER ORDERED AND ADJUDGED by the Court that the case be REMANDED for further proceedings before the Board consistent with the Court's opinion.”

2. CNN further requests that the order and appendix attached to the Board's revised proposed judgment be modified to reflect the Board's reservation of important remedial issues to compliance proceedings. After the Board issued its decision, CNN moved to reopen the record to show, *inter alia*, that changes in its operations made the hiring and training of the prior TVS workforce unduly burdensome and the restoration of the TVS terms and conditions of employment “literally impossible.” J.A. 7465, 362 NLRB No. 38, at 1 (Mar. 20, 2015). In a formal order, 362 NLRB No. 38, the Board specifically reserved to CNN “*the opportunity to show . . . that those remedies must be modified*” in light of changed circumstances in “the compliance phase of this proceeding.” J.A. 7465 (emphasis added); 362 NLRB No. 38, at 1; *see slip op. 37* (quoting same).

Accordingly, when the Board ordered CNN to “offer employment to the former TVS employees,” to “provide whatever training it has provided”

to other similarly situated employees,” and to [r]estore any bargaining unit work which has been contracted out,” J.A. 7466, ¶ 1 (modifying original order); J.A. 7366, ¶ 2(e), (g) (original order), it did so with the clear understanding that these remedies would be addressed during the “compliance phase of this proceeding.” J.A. 7465. Similarly, this Court also recognized that the Board had reserved several significant issues for later consideration in the compliance phase of the proceeding before the Board in determining that CNN’s challenges to those aspects of the Board’s remedies ruling was “premature” at this stage in the litigation. Slip op. 37-38.

The Board’s proposed order, however, does not mention the compliance phase and therefore could be misread to require that CNN undertake remedies immediately. Moreover, the Board’s proposed order sets dates for CNN to take actions within a number of days of “the Board’s Order” without defining the order to which it is referring. *See* Proposed Order ¶ 2(b).

CNN respectfully requests that the proposed order and appendix be modified to address both of these issues. Specifically, CNN requests that the proposed order be modified to (1) insert the phrase “Subject to further proceedings and a subsequent order by the Board (the “Board’s Remedial Order”),” at the beginning of the order, and (2) insert the phrase “Within 14

days of entry of the Board's Remedial Order," at the beginning of paragraphs 2(b), (c), (d), (e), and (f).¹

3. The Board's proposed order and appendix should also be modified to reflect this Court's limitation on the remedy based on *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999 (D.C. Cir. 1998). Under that decision, the Board may order a successor employer to adhere to "the terms of the prior [collective bargaining agreement] *only for a period allowing for a reasonable time of bargaining.*" *Id.* at 1011 (emphasis added) (internal quotation marks omitted)); *see slip op.* 36.

Although the Court appears to have sought to address that issue by ordering the Board to remove proposed paragraphs 2(e), (h), (i), (j), and (l) from the previous proposed order, CNN respectfully suggests that the revised proposed order still runs afoul of *Capital Cleaning* in paragraphs 1(b), 1(d), 2(e) and 2(f). CNN should not be ordered to "[c]ease and desist" from "[r]efusing to comply with the collective-bargaining agreements between TVS and the Union," "changing the wages, hours, and other terms and conditions of employment," or "[u]nilaterally limiting the number of TVS bargaining unit employees it hired" without any temporal limitations. Proposed Or-

¹ As CNN argues below, all of paragraphs 2(e) and 2(f) should be stricken. CNN requests the addition of this prefatory language to those paragraphs in the alternative in the event the Court decides not to remove the paragraphs entirely.

der ¶ 1(b), (d). Similarly, CNN should not be ordered to “[r]estore any bargaining unit work, which has been contracted out without notice to and bargaining with the Union” without any temporal limitations. Proposed Order ¶ 2(e), (f). Imposing such obligations suggests current duties under the TVS collective bargaining agreements that the Board has previously recognized CNN “was not bound by.” J.A. 7259 n.35 (quotation marks omitted).²

4. Finally, the Board’s proposed order and appendix should be modified to remove any reference to a bargaining obligation unless the Board provides a sufficient explanation for imposing one. Slip op. 39. The Court has already rejected the Board’s request that CNN be ordered to “[n]otify the Union in writing . . . that it will bargain with the Union” when it ordered the Board to submit a new judgment that did not include paragraph 2(a) of the previous proposed order. For the same reason, CNN should not be ordered to “[c]ease and desist” from “[r]efusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representatives.” Proposed Order, ¶ 1(c). Paragraph 1(c) should be stricken from the revised proposed order as being inconsistent with the Court’s decision. Similarly, CNN should not be ordered to “[r]estore any bargaining unit work,

² Paragraph 2(f) should also be removed because at the time of the termination of the agreements, an employer was under no obligation to remit union dues after the termination of a collective bargaining agreement. *Bethlehem Steel Co.*, 136 NLRB 1500 (1962); see *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (changing rule but not applying it retroactively).

which has been contracted out without notice to and bargaining with the Union,” as the Board has yet to determine whether CNN has a duty to bargain with the union. Proposed Order ¶ 2(e).

* * * * *

As the foregoing shows, problems persist in the Board’s revised proposed judgment despite the Court’s order removing inappropriate elements from the Board’s previous proposed judgment. Accordingly, CNN respectfully requests that the Court modify the proposed judgment, order, and appendix as outlined above. To assist the Court’s review, attached as exhibits are a version containing the modifications and a version showing the changes in redline.

Respectfully submitted,

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OCTOBER 20, 2017

**CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, Kannon K. Shanmugam, counsel for petitioner and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d)(1)(E), that the foregoing Response of CNN America, Inc., to Revised Proposed Judgment of the National Labor Relations Board is proportionately spaced, has a typeface of 14 points or more, and contains 1,162 words.

s/ Kannon K. Shanmugam

KANNON K. SHANMUGAM

OCTOBER 20, 2017

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for respondent/cross-petitioner CNN America, Inc., certify that, on October 20, 2017, a copy of the attached Response of CNN America, Inc., to Revised Proposed Judgment of the National Labor Relations Board was filed with the Clerk served through the Court's electronic filing system. I further certify that all parties required to be served have been served.

s/ Kannon K. Shanmugam

KANNON K. SHANMUGAM